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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kathleen Whittaker,) Case No.
)
Plaintiff,) COMPLAINT AND TRIAL BY JURY
) DEMAND
vs.)
)
Midland Credit Management, Inc. and)	
Midland Funding, LLC,)
)
Defendants.)

NATURE OF ACTION

1. Plaintiff Kathleen Whittaker ("Plaintiff") brings this action against Defendants Midland Credit Management, Inc. ("MCM") and Midland Funding, LLC ("Midland Funding") (collectively, "Defendants") pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*

JURISDICTION, VENUE, AND STANDING

2. This Court has jurisdiction pursuant to 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

1 3. Venue is proper before this Court pursuant to 28 U.S.C. § 1391(b), where
2 the acts and transactions giving rise to Plaintiff's action occurred in this district, where
3 Plaintiff resides in this district, and where Defendants transact business in this district.
4

5 4. "In determining whether an intangible harm constitutes injury in fact, both
6 history and the judgment of Congress play important roles." *Spokeo, Inc. v. Robins*, 136
7 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016). Congress is
8 "well positioned to identify intangible harms that meet minimum Article III
9 requirements," thus "Congress may 'elevat[e] to the status of legally cognizable injuries
10 concrete, *de facto* injuries that were previously inadequate in law.'" *Id.* (quoting *Lujan v.*
11 *Defs of Wildlife*, 504 U.S. 555, 578 (1992)).
12
13

14 5. "Without the protections of the FDCPA, Congress determined, the
15 '[e]xisting laws and procedures for redressing these injuries are inadequate to protect
16 consumers.'" *Lane v. Bayview Loan Servicing, LLC*, No. 15 C 10446, 2016 WL
17 3671467, at *3 (N.D. Ill. July 11, 2016) (quoting 15 U.S.C. § 1692(b)). Thus, a failure to
18 honor a consumer's right under the FDCPA constitutes an injury in fact for Article III
19 standing. *See id.* at *3 (holding that a consumer "has alleged a sufficiently concrete
20 injury because he alleges that [Defendant] denied him the right to information due to him
21 under the FDCPA"); *see also Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL
22 3611543, at *3 (11th Cir. July 6, 2016) (holding that consumer's § 1692g claim was
23 sufficiently concrete to satisfy injury-in-fact requirement).
24
25
26

27 6. "The FDCPA does create an informational right which did not exist prior to
28 its enactment, and that right is tied to the harm which a consumer may suffer if not

provided with that information. Consequently, the deprivation of that information is, in most cases, sufficient to confer Article III standing. That was the law before *Spokeo*, and that law was not based on an erroneous understanding of Article III like the one corrected by *Spokeo*, but by application of well-settled principles of standing jurisprudence which *Spokeo* did not change (and, in fact, upon which *Spokeo* relied).” *Hagy v. Demers & Adams, LLC*, No. 2:11-CV-530, 2017 WL 1134408, at *4 (S.D. Ohio Mar. 27, 2017).

7. “[N]umerous other courts, including courts in this circuit and from around the country, have rejected *Spokeo*-based standing challenges in the context of FDCPA violations.” *Neeley v. Portfolio Recovery Assocs., LLC*, No. 115CV01283RLYMJD, 2017 WL 3311045, at *2 (S.D. Ind. Aug. 2, 2017) (citing *Pogorzelski v. Patenaude & Felix APC*, No. 16-C-1330, 2017 WL 2539782, at *4, 2017 U.S. Dist. LEXIS 89678, at *11 (E.D. Wis. June 12, 2017)) (collecting cases).

8. “[E]ven though actual monetary harm is a sufficient condition to show concrete harm, it is *not* a necessary condition.” *Lane*, 2016 WL 3671467 at *4 (emphasis in original).

THE FAIR DEBT COLLECTION PRACTICES ACT

9. Congress enacted the FDCPA in order to eliminate “abusive debt collection practices by debt collectors [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.” *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1179-80 (9th Cir. 2006) (citing 15 U.S.C. § 1692(e)).

1 10. To protect consumers and ensure compliance by debt collectors, “the
2 FDCPA is a strict liability statute.” *McCullough v. Johnson, Rodenburg & Lauinger,*
3 *LLC*, 637 F.3d 939, 948 (9th Cir. 2011).

4
5 11. Strict liability enhances “the remedial nature of the statute,” and courts are
6 “to interpret it liberally” to protect consumers. *Clark*, 460 F.3d at 1176.

7
8 12. In addition, by making available to prevailing consumers both statutory
9 damages and attorneys’ fees, Congress “clearly intended that private enforcement actions
10 would be the primary enforcement tool of the Act.” *Baker v. G.C. Servs. Corp.*, 677 F.2d
11 775, 780-81 (9th Cir. 1982); *see also Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d
12 1109, 1118 (9th Cir. 2014).

13
14 13. Violations of the FDCPA are assessed under the least sophisticated
15 consumer standard which is “‘designed to protect consumers of below average
16 sophistication or intelligence,’ or those who are ‘uninformed or naïve,’ particularly when
17 those individuals are targeted by debt collectors.” *Gonzales v. Arrow Fin. Servs., LLC*,
18 660 F.3d 1055, 1061 (9th Cir. 2011) (quoting *Duffy v. Landberg*, 215 F.3d 871, 874-75
19 (8th Cir. 2000)).

20
21
22 14. “An FDCPA Plaintiff need not even have actually been misled or deceived
23 by the debt collector’s representation; instead, liability depends on whether the
24 *hypothetical* ‘least sophisticated debtor’ likely would be misled.” *Tourgeman*, 755 F.3d
25 at 1117-18 (emphasis in original).

26
27 15. “[B]ecause the FDCPA is a remedial statute aimed at curbing what
28 Congress considered to be an industry-wide pattern of and propensity towards abusing

1 debtors, it is logical for debt collectors—repeat players likely to be acquainted with the
 2 legal standards governing their industry—to bear the brunt of the risk.” *Clark*, 460 F.3d at
 3 1171-72; *see also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965) (“[I]t does
 4 not seem unfair to require that one who deliberately goes perilously close to an area of
 5 proscribed conduct shall take the risk that he may cross the line.”) (internal quotations
 6 omitted).

9 **PARTIES**

10 16. Plaintiff is a natural person who at all relevant times resided in the State of
 11 County of Maricopa, and City of Chandler Heights.

12 17. Plaintiff is a “consumer” as defined by 15 U.S.C. § 1692a(3).

13 18. MCM is an entity who at all relevant times was engaged, by use of the
 14 mails and telephone, in the business of attempting to collect a “debt” from Plaintiff, as
 15 defined by 15 U.S.C. § 1692a(5).
 16

17 19. MCM is a “debt collector” as defined by 15 U.S.C. § 1692a(6).
 18

19 20. Midland Funding is an entity who acquires debt in default merely for
 20 collection purposes, and who at all relevant times was engaged in the business of directly
 21 or indirectly attempting to collect a “debt” from Plaintiff, as defined by 15 U.S.C. §
 22 1692a(5).
 23

24 21. Midland Funding is a “debt collector” as defined by 15 U.S.C. § 1692a(6).
 25

26 **FACTUAL ALLEGATIONS**

27 22. Plaintiff is a natural person allegedly obligated to pay a debt.
 28

1 23. Plaintiff's alleged obligation arises from a transaction in which the money,
2 property, insurance, or services that are the subject of the transaction were incurred
3 primarily for personal, family, or household purposes—namely, a Wells Fargo account
4 (the "Debt").
5

6 24. MCM uses instrumentalities of interstate commerce or the mails in a
7 business the principal purpose of which is the collection of debt.
8

9 25. MCM regularly collects or attempts to collect, directly or indirectly, debts
10 owed or due, or asserted to be owed or due, another.
11

12 26. Midland Funding directly or indirectly uses instrumentalities of interstate
13 commerce or the mails in a business the principal purpose of which is the collection of
14 debt.
15

16 27. Midland Funding acquired Plaintiff's Debt after it was in default.

17 28. On February 20, 2014, Midland Funding filed a lawsuit in the San Tan
18 Justice Court in the Court of Maricopa, and the State of Arizona.
19

20 29. Plaintiff and Midland Funding made an agreement to a stipulated judgment
21 and a conditional agreement not to execute the judgment.

22 30. A true and correct copy of the agreement to stipulated judgment and
23 conditional agreement not to execute is attached as Exhibit A.
24

25 31. Plaintiff and Midland Funding agreed that:

26 The account balance is to be paid as follows: monthly payments of \$150.00
27 will be due beginning September 25, 2014 and continuing on the 25th day of
28 each consecutive month thereafter, until the settlement amount of \$5000.00,
is paid in full.

1 Exhibit A.

2 32. On October 5, 2014, the judgment was entered.

3 33. A true and correct copy of the judgment is attached as Exhibit B.

4 34. The judgment stated:

5
6 IT IS HEREBY ORDERED granting judgment in favor of the Plaintiff and
7 against Defendant for the principal amount of \$9252.90 plus courts costs in
8 the amount of \$191.00 for a total judgment amount of \$9,443.90.
9 Defendant shall pay this judgment pursuant to the terms contained in the
10 parties' Agreement to Stipulated and Conditional Agreement Not to
Execute.

11 Exhibit B.

12 35. In accordance with the agreement to stipulated judgment and conditional
13 agreement not to execute, Plaintiff made timely payments to Midland Funding starting in
14 September 2014.

15 36. On January 16, 2017, MCM, itself and on behalf of Midland Funding, sent
16 Plaintiff a letter in connection with the collection of the Debt.

17 37. A true and correct copy of MCM's January 16, 2017 letter is attached to
18 this complaint as Exhibit C.

19 38. At the time MCM sent its January 16, 2017 letter, Plaintiff had made 26
20 payments of \$150.00 to Midland Funding, totaling \$3,900.00.

21 39. At the time MCM sent its January 16, 2017 letter, Plaintiff had \$1,100.00
22 remaining on the agreed payment amount for the Debt.

23 40. MCM's January 16, 2017 letter states that Plaintiff had only paid \$3,123.84
24 on the Debt.
25
26
27
28

1 41. MCM's January 16, 2017 letter states that the current balance of the Debt is
2 \$8,457.92.

3
4 42. Plaintiff continued making timely payments until July 2017 in accordance
5 with the agreement to stipulated judgment and conditional agreement not to execute.

6 43. As of July 2017, Plaintiff made 35 payments of \$150.00 to Midland
7 Funding, totaling \$5,250.00.

8
9 44. As of July 2017, Plaintiff had overpaid Midland Funding by \$250.00 than
10 called for in the agreement to stipulated judgment and conditional agreement not to
11 execute.

12
13 45. On September 13, 2017, Plaintiff contacted Defendants and spoke with a
14 representative of MCM or Midland Funding.

15 46. Defendants' representative assured Plaintiff that she would receive a refund
16 for her overpaid amount of \$250.00.

17
18 47. During the September 13, 2017 conversation, Defendants' representative
19 told Plaintiff that the refund may take ten to fourteen days.

20
21 48. After fourteen days had passed, Plaintiff did not receive her refund of
22 \$250.00 from MCM or Midland Funding.

23 49. Plaintiff subsequently called MCM or Midland Funding four additional
24 times in effort to discuss and receive her refund of \$250.00.

25
26 50. During these four additional calls, MCM or Midland Funding did not
27 answer.

28 51. During these four additional calls, Plaintiff left a voicemail message.

58. MCM violated 15 U.S.C. § 1692e(2)(A) by falsely representing the character, amount, or legal status of Plaintiff's alleged debt, including in its January 16, 2017 letter and by collecting and retaining more payments from Plaintiff than agreed.

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- a) Adjudging that MCM violated 15 U.S.C. § 1692e(2)(A);
- b) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. § 1692k(a)(2)(A), in the amount of \$1,000.00;
- c) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. § 1692k(a)(1);
- d) Awarding Plaintiff reasonable attorneys' fees and costs incurred in this action pursuant to 15 U.S.C. § 1692k(a)(3);
- e) Awarding Plaintiff pre-judgment and post-judgment interest as permissible by law; and
- f) Awarding such other and further relief as the Court may deem proper.

COUNT II
VIOLATION OF 15 U.S.C. § 1692e(2)(B)
MCM

59. Plaintiff repeats and re-alleges each factual allegation above.

60. Within this broad prohibition, the FDCPA specifically forbids the "false representation of—any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." 15 U.S.C. § 1692e(2)(B); *see West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983) (holding that defendants violated § 1692e(2)(B) because "there was no legal basis for imposing the service charges. Therefore the service charges were compensation which cannot be 'legally received'").

1 64. MCM violated 15 U.S.C. § 1692e(10) by using false, deceptive, or
2 misleading representations or means in connection with the collection of any debt.
3

4 WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- 5 a) Adjudging that MCM violated 15 U.S.C. § 1692e(10);
6 b) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. §
7 1692k(a)(2)(A), in the amount of \$1,000.00;
8 c) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. § 1692k(a)(1);
9 d) Awarding Plaintiff reasonable attorneys' fees and costs incurred in this
10 action pursuant to 15 U.S.C. § 1692k(a)(3);
11 e) Awarding Plaintiff pre-judgment and post-judgment interest as permissible
12 by law; and
13 f) Awarding such other and further relief as the Court may deem proper.
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16

17 **COUNT IV**
18 **VIOLATION OF 15 U.S.C. § 1692f**
19 **MCM**

20 65. Plaintiff repeats and re-alleges each factual allegation above.

21 66. The FDCPA also prohibits the use of unfair or unconscionable means to
22 collect debts. *See* 15 U.S.C. § 1692f.

23 67. In addition to the non-exhaustive list of conduct that violates the FDCPA, §
24 1692f “allows a court to sanction improper conduct the FDCPA fails to address
25 specifically.” *Turner v. Professional Recovery Services, Inc.*, 956 F. Supp. 2d 573, 580
26 (D.N.J. 2013) (quoting *Adams v. Law Offices of Stuckert & Yates*, 926 F. Supp. 521, 528
27 (E.D. Pa. 1996)).
28

68. As an example of unfair and unconscionable conduct, the FDCPA also specifically prohibits the collection of any amount from a consumer, unless such collection is expressly authorized by agreement or law. 15 U.S.C. § 1692f(1).

69. MCM violated 15 U.S.C. §§ 1692f and 1692f(1) by using unfair or unconscionable means against Plaintiff in connection with an attempt to collect an alleged debt, including taking more money from Plaintiff than agreed under the stipulated judgment and by failing to promptly return the overpayment, thus depriving Plaintiff of the rightful use of those funds for months.

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- a) Adjudging that MCM violated 15 U.S.C. § 1692f;
- b) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. § 1692k(a)(2)(A), in the amount of \$1,000.00;
- c) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. § 1692k(a)(1);
- d) Awarding Plaintiff reasonable attorneys' fees and costs incurred in this action pursuant to 15 U.S.C. § 1692k(a)(3);
- e) Awarding Plaintiff pre-judgment and post-judgment interest as permissible by law; and
- f) Awarding such other and further relief as the Court may deem proper.

COUNT V
VIOLATION OF 15 U.S.C. § 1692e(2)(A)
Midland Funding

70. Plaintiff repeats and re-alleges each factual allegation above.

1 71. MCM violated 15 U.S.C. § 1692e(2)(A) by falsely representing the
2 character, amount, or legal status of Plaintiff's alleged debt.

3
4 72. Midland Funding, by virtue of its status as a "debt collector" under the
5 FDCPA, is liable for the conduct of MCM — the debt collector it retained to collect on
6 its behalf.

7
8 WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- 9 a) Adjudging that Midland Funding violated 15 U.S.C. § 1692e(2)(A);
10 b) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. §
11 1692k(a)(2)(A), in the amount of \$1,000.00;
12 c) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. § 1692k(a)(1);
13 d) Awarding Plaintiff reasonable attorneys' fees and costs incurred in this
14 action pursuant to 15 U.S.C. § 1692k(a)(3);
15 e) Awarding Plaintiff pre-judgment and post-judgment interest as permissible
16 by law; and
17 f) Awarding such other and further relief as the Court may deem proper.

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21 **COUNT VI**
22 **VIOLATION OF 15 U.S.C. § 1692e(2)(B)**
23 **Midland Funding**

24 73. Plaintiff repeats and re-alleges each factual allegation above.

25 74. MCM violated 15 U.S.C. § 1692e(2)(B) by falsely representing
26 compensation which may be lawfully received by Defendant for collection of Plaintiff's
27 alleged debt.
28

- a) Adjudging that Midland Funding violated 15 U.S.C. § 1692e(10);
- b) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. § 1692k(a)(2)(A), in the amount of \$1,000.00;
- c) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. § 1692k(a)(1);
- d) Awarding Plaintiff reasonable attorneys' fees and costs incurred in this action pursuant to 15 U.S.C. § 1692k(a)(3);
- e) Awarding Plaintiff pre-judgment and post-judgment interest as permissible by law; and
- f) Awarding such other and further relief as the Court may deem proper.

COUNT VIII
VIOLATION OF 15 U.S.C. § 1692f
Midland Funding

79. Plaintiff repeats and re-alleges each factual allegation contained above.

80. MCM violated 15 U.S.C. § 1692f by using unfair or unconscionable means against Plaintiff in connection with an attempt to collect an alleged debt.

81. Midland Funding, by virtue of its status as a “debt collector” under the FDCPA, is liable for the conduct of MCM — the debt collector it retained to collect on its behalf.

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- a) Adjudging that Midland Funding violated 15 U.S.C. § 1692f;
- b) Awarding Plaintiff statutory damages, pursuant to 15 U.S.C. § 1692k(a)(2)(A), in the amount of \$1,000.00;
- c) Awarding Plaintiff actual damages, pursuant to 15 U.S.C. § 1692k(a)(1);

- 1 d) Awarding Plaintiff reasonable attorneys' fees and costs incurred in this
2 action pursuant to 15 U.S.C. § 1692k(a)(3);
3
4 e) Awarding Plaintiff pre-judgment and post-judgment interest as permissible
5 by law; and
6
7 f) Awarding such other and further relief as the Court may deem proper.

8 **TRIAL BY JURY**

9 82. Plaintiff is entitled to and hereby demands a trial by jury.

10 Dated: January 16, 2018

11 Respectfully submitted,

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